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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AKRAM NAIEHARVEY, Plaintiff and Appellant, v. MAXWELL TALAI, JR. et al., Defendants and Respondents.	G055775 (Super. Ct. No. 30-2016-00865628) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Farahi Law Firm and Justin P. Farahi; Jeff Lewis Law and Jeffrey Lewis for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Mark S. Levine, Armen Alexander Avakian and Adam C. Hackett for Defendants and Respondents.

* * *

Maxwell Talai, Jr.[1] rear-ended Akram Naieharvey in a car accident in the city of Irvine. The jury found for Talai at the conclusion of the resulting personal injury trial. Thereafter, Naieharvey moved for judgment notwithstanding the verdict (JNOV), which the trial court denied.

Naieharvey appeals the trial court's order denying her motion for JNOV. She claims the court erred because Talai conceded liability and as such, the jury's defense verdict was inconsistent with the uncontradicted evidence. Talai counters that while he conceded liability for the car accident, Naieharvey and her expert witnesses were not credible at trial and failed to prove the accident caused her purported extensive (and expensive) injuries. We agree with Talai. There was substantial evidence in favor of the verdict. The order is affirmed.

FACTS

On November 3, 2015, Talai rear-ended Naieharvey at a speed of one to two miles per hour, pushing Naieharvey's car forward and causing her to strike the car in front of her.[2] On November 4, 2015, Naieharvey went to urgent care. Urgent care recommended hot/cold packs, rest, stretching exercises, and prescribed Ibuprofen. Dissatisfied with the treatment plan provided by urgent care, Naieharvey went out of her medical insurance network to a pain management specialist she found on the internet, Dr. Sonny Rubin.

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[1] An amended complaint also named Maxwell Talai, Sr. as a defendant. Naieharvey alleged negligent entrustment on the part of Talai, Sr. The trial court granted Maxwell Talia, Sr.'s motion for nonsuit on negligent entrustment.

[2] Damages to Naieharvey's car were not addressed by the parties as an item of damages at trial. The only damages pertinent to this appeal are therefore the personal injuries claimed by Naieharvey as a result of the accident.

On November 5, 2015, Naieharvey had her first appointment with Dr. Rubin. Dr. Rubin also referred Naieharvey to a chiropractor, Dr. Ali Mostafavi. Naieharvey later sued Talai, alleging she suffered personal injury related to the collision.

Talai conceded liability for the collision. Prior to trial, the parties filed a statement of controverted issues. The disputed issues for trial included: "1. The nature, extent, causation, treatment and costs of treatment of the injuries [Naieharvey] attributes to the subject incident. [¶] 2. The reasonableness and necessity of [Naieharvey's] medical treatment and the cost of the same to date. [¶] 3. The nature and extent of [Naieharvey's] alleged lost earnings and loss of earning capacity (past & future), as well as [¶] 4. The nature and extent of [Naieharvey's] general damages, including alleged pain and suffering and emotional distress damages (past & future). [¶] 5. The allegations of negligent entrustment on the part of Maxwell Talai, Sr."

A jury trial occurred in 2017. At trial, Naieharvey testified the accident caused injuries to her neck, shoulder, and back. She claimed the accident affected her everyday life and stated she was physically unable to attend movies with her husband due to sitting-related aggravation of her back pain.

Naieharvey's husband testified his wife stated she was in "good condition" while she was at the accident scene. He also testified he was an auto mechanic; he inspected his wife's vehicle after the accident and let her drive it home alone.

Dr. Rubin testified Naieharvey's current pain and symptoms were caused by the accident. Dr. Rubin, however, conceded he never reviewed MRI images which formed the basis for his decision to prescribe six epidural procedures for Naieharvey. He requested the epidurals notwithstanding normal cervical findings for motor, sensory, and reflex testing. Dr. Rubin could not confirm whether he spoke with Naieharvey's other treating physicians and contended it was not "real world medicine" to either seek or obtain all of the potentially pertinent records of his patients. Dr. Rubin stated Naieharvey signed a medical lien for her treatment. For the three cervical epidurals and three lumbar

epidurals, he estimated his "global price" was approximately $14,000. He acknowledged the cost for similar procedures at a hospital across the street from his facilities was about $3,000 and the fees elsewhere could be even less. Dr. Rubin's bill for services rendered to Naieharvey was $38,670. Dr. Mostafavi, Naieharvey's chiropractor, testified that "at least 95 percent" of her injuries were caused by the accident.

Talai introduced expert testimony from Dr. John Lieu, a diagnostic radiologist. Dr. Lieu reviewed Naieharvey's MRI from November 17, 2015, and stated she appeared to have a preexisting herniated disk due to aging. He opined it was "more probable than not" that issues with Naieharvey's spine were "not caused by the accident." He testified that a preexisting herniated bulge from aging could be exacerbated by a car accident.

Dr. Michael Weinstein, an orthopedic surgeon, also testified as a defense expert. Dr. Weinstein evaluated Naieharvey's medical records and examined her in June 2017. Dr. Weinstein testified as to Naieharvey's medical history, stating she fell off a chair and hit the back of her head on July 25, 2011; was in another car accident on March 18, 2013; complained of neck and shoulder pain on March 4, 2014, due to the size of her breasts; and fell on November 30, 2015, striking her head. Dr. Weinstein opined Naieharvey "suffered a cervical sprain as a result of" the car accident and that she was "having some intermittent neck pain." He based this opinion upon Naieharvey's statement she was having ongoing neck pain at her June 2017 examination. He found no evidence of pinched nerves, fractures, dislocations beyond a normal variant, or pressure on the spinal cord.

Talai introduced photographs at trial showing Naieharvey at a New Year's Eve party after the accident. Talai presented evidence Naieharvey flew 15 to 17 hours round trip to Iran during the same period she claimed not to be able to sit for a movie due to back pain.

The jury reached a special verdict in favor of Talai, finding his negligence was not a substantial factor in causing harm to Naieharvey. It awarded no damages to Naieharvey. Naieharvey filed a motion for JNOV and new trial. Naieharvey argued the jury's finding of no causation was unsupported by the evidence, and that Talai had conceded causation as to at least some of her injuries. The court denied both motions. Naieharvey appealed from the denial of the motion for JNOV.

DISCUSSION

Naieharvey bases her appeal on the notion Talai conceded she suffered injuries as a result of their car accident. We disagree. While Talai conceded liability for the accident, he did not admit the accident caused Naieharvey's claimed injuries. Evidence at trial supported the jury's determination that Naieharvey did not prove the accident with Talai caused her injuries. Viewing the evidence in a light most favorable to the judgment as we must, the jury found Naieharvey's evidence was not credible and Talai's evidence demonstrated a lack of causation. Naieharvey also argues the court erred by failing to instruct the jury of their obligation to find in her favor on the existence of damages. We find no error and affirm the order denying Naieharvey's motion for JNOV.

1. *Substantial Evidence Supported the Trial Court's Denial of Naieharvey's Motion for JNOV*

On appeal from the denial of a JNOV motion, we review the record de novo to determine whether there was substantial evidence to support the verdict and whether the moving party was entitled to judgment in its favor as a matter of law. (*Linear Technology Corp. v. Tokyo Electron, Ltd*. (2011) 200 Cal.App.4th 1527, 1532.) "'The scope of appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict is to determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion and where so found, to uphold the trial court's denial of the motion.'" (*Pusateri v. E. F. Hutton & Co*. (1986)

180 Cal.App.3d 247, 250.) Applying the substantial evidence rule, we resolve "all conflicts in the evidence and all legitimate and reasonable inferences that may arise therefrom in favor of the jury's findings and the verdict." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1137-1138.)

Naieharvey contends Talai's experts conceded the injury existed.[3] Contrary to Naieharvey's assertion, Dr. Lieu opined it was "more probable than not" that issues with Naieharvey's spine were "not caused by the accident." Ignoring this clear testimony, Naieharvey cites only Dr. Lieu's affirmative response to a hypothetical question posed by counsel asking if a preexisting herniated bulge from aging could be exacerbated by a car accident. Dr. Lieu did not concede the accident with Talai caused Naieharvey's injuries, quite the opposite. Similarly, Naieharvey claims Dr. Weinstein also conceded she suffered injuries caused by the accident. Dr. Weinstein opined Naieharvey "suffered a cervical sprain as a result of" the car accident and that she was "having some intermittent neck pain." He qualified his testimony, stating it was based upon Naieharvey's subjective statement that she was having ongoing neck pain at her June 2017 examination. Dr. Weinstein also testified he found no evidence of pinched nerves, fractures, dislocations beyond a normal variant, or pressure on Naieharvey's spinal cord. Talai did not concede causation.

While Naieharvey may have sustained some injury to her back and neck at some point in time, evidence at trial was murky at best as to when the injuries occurred or even where the injuries were located. Evidence showed Naieharvey experienced another car accident and a slip and fall incident. She also had preexisting back and neck pain due

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[3] Naieharvey also argues Talai's trial counsel conceded the causation issue during opening statements: "One thing I want to get clear here is [Naieharvey's trial counsel] indicated that we're going to get up here and . . . say there is no injury. That is not the case at all." Counsel's arguments are not evidence. We do not consider Talai's counsel's statements as a concession of causation as to Naieharvey's injuries.

to her breast size. In light of the multiple accidents and preexisting conditions, Naieharvey's evidence failed to prove that it was the accident with Talai that caused her injuries.

Further casting doubt on the strength of Naieharvey's evidence was the fact that the jury could have found her testimony and that of her expert witnesses not credible. Despite Naieharvey's contention she suffered substantial and permanent injuries to her neck and back as a result of the accident with Talai, evidence provided by Naieharvey herself, and her witnesses, potentially undermined her claims. Naieharvey testified the accident occurred at one to two miles an hour. Naieharvey's husband affirmed she was in "good condition" at the accident scene and did not see major damage to her car. Photographic evidence produced by Talai contradicted Naieharvey's claim that the accident changed her life, as it allowed the jury to surmise Naieharvey enjoyed a physically active social life two months post-accident. Naieharvey's testimony that she was physically unable to attend movies with her husband because of sitting-related aggravation of her back pain was impeached by evidence Naieharvey flew round-trip from Los Angeles to Iran during the relevant period of time.

Furthermore, the jury could have determined Naieharvey's expert lacked credibility. Dr. Rubin did not review all of Naieharvey's available medical records, seemed ill-prepared for trial, and failed to produce evidence to support his opinions. The jurors were not required to accept the expert opinion proffered by the witness.[4]

Naieharvey relies on *Gordon v. Strawther Enterprises, Inc*. (1969) 273 Cal.App.2d 504, 515 (*Gordon*) to support her case. In *Gordon*, a minor was severely

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[4] At trial, the court instructed the jury on CACI No. 219 (Expert Witness Testimony), which states in pertinent part: "You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony . . . ."

injured from falling into a swimming pool. (*Id.* at p. 508.) The minor sued the entity with control of the apartment complex where the pool was located (equitable owner), as well as the legal owner. (*Id.* at p. 506.) The jury awarded a verdict in the sum of $500,000 in favor of minor as against the legal owner, and rendered a verdict that minor take nothing as against the equitable owner. (*Ibid*.) The minor moved for JNOV as against the equitable owner, which was denied. (*Id.* at p. 507.) The minor appealed the denial of the motion for JNOV and the Court of Appeal reversed. (*Id.* at p. 519.) Evidence at trial demonstrated equitable owners, who lived on the premises, knew that there were children about and that pool gates did not have automatic latches required by ordinance and were not secured. (*Id.* at p. 507.) Based on this evidence of negligence, the Court of Appeal held the motion for JNOV should have been granted and ordered a new trial solely on the issue of damages. (*Id.* at p. 516.)

Naieharvey contends the facts of this case are indistinguishable from *Gordon*. We disagree. Here, in contrast to the overwhelming evidence of negligence in *Gordon*, Naieharvey failed to provide credible evidence of causation and Talai provided substantial evidence to support the jury's verdict. The trial court did not err in denying the motion for JNOV.

2. *The Trial Court Did Not Commit Instructional Error*

Naieharvey contends the trial court erred by failing to instruct the jury sua sponte of their obligation to find in her favor on the existence of damages. Talai argues the court had no such duty to instruct on causation because there was substantial evidence for the jury to address the causation issue. We agree. The court did not err by failing to instruct sua sponte on the issue of causation in Naieharvey's favor.

Ordinarily, a trial court has no sua sponte duty to instruct a jury. (*Veronese v. Lucasfilm Ltd*. (2012) 212 Cal.App.4th 1, 28.) However, a sua sponte duty to instruct is present as to "'material issues and controlling legal principles which may amount to

reversible error.'" (*Ibid*.) We review a claim of instructional error de novo. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.)

As discussed above, substantial evidence supported the jury's determination that the car accident did not cause Naieharvey's injuries. Contrary to Naieharvey's assertion, Talai presented opposing evidence at trial related to causation. Because the evidence did not clearly demonstrate causation, and Talai did not concede causation, the court had no duty to instruct the jury sua sponte it was required to find in Naieharvey's favor on the issue of causation.

Naieharvey cites *Thomas v. Buttress & McClellan, Inc*. (1956) 141 Cal.App.2d 812 (*Thomas*) to support her argument. *Thomas* was a 1956 decision arising from an action for the recovery of commissions under an oral contract of employment. (*Id.* at p. 814.) The plaintiff was a sales manager for a company (the defendant) that sold "turnkey" construction jobs, which required the defendant to furnish all engineering and architectural services, supply all labor and material, and deliver a completed structure for an agreed price. (*Id*. at p. 815.) The plaintiff filed suit, alleging he had not been adequately compensated for his work. (*Id*. at pp. 815-19.) The jury returned a verdict in the plaintiff's favor and the defendant appealed from the judgment on the grounds of an excessive verdict. (*Id.* at p. 820.) The *Thomas* Court of Appeal reversed, citing the trial court's failure to sua sponte instruct a jury on the appropriate measure of damages. (*Id.* at p. 819.) "The trial court on its own motion should have instructed the jury that the measure of recovery in the event they should adopt plaintiff's version of the facts would be one-fourth of one per cent of defendant's $435,000 fee, so far as the [construction] job was concerned. The cause must be reversed. Of course there was a substantial conflict in the evidence upon this vital issue, for defendant [] testified in effect that he and plaintiff agreed that the latter should have no commission on the [construction] job. Upon a new trial it would be the duty of the trial judge to give appropriate instructions upon the separate theories advanced by the respective parties." (*Id.* at p. 820.)

Here, in contrast to *Thomas*, there was no verdict in favor of Naieharvey. Furthermore, the trial court did instruct the jury as to the items of damages claimed by Naieharvey if it decided Talai's negligence was a substantial factor in causing Naieharvey's harm. The jury determined Talai's negligence was not a substantial factor in causing Naieharvey's harm, and *Thomas* is not instructive because the issue of damages never went to the jury. We find no instructional error.

DISPOSITION

The order is affirmed. Talai shall recover his costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.